STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of K. A. PLANCK, Minor.

UNPUBLISHED
September 16, 2014

Nos. 321015; 321017
Cass Circuit Court
Family Division
LC No. 12-000171-NA

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

In docket nos. 321015 and 321017, respondent-father and respondent-mother respectively appeal as of right the February 25, 2014 order terminating their parental rights to the minor child KP pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm if child is returned to parent). We affirm.

In docket no. 321015, respondent-father argues that his fundamental right to due process was violated below. Specifically, he argues that the release of his parental rights to another child named EP was not freely and voluntarily made because the trial court failed to provide respondent-father "a complete advice of rights" before he executed the release. MCL 710.29(6); *In re Burns*, 236 Mich App 291, 292; 599 NW2d 783 (1999). Respondent-father argues that the February 25, 2013 order terminating his parental rights to KP should be reversed because the trial court considered the fact that respondent-father previously released his parental rights to EP when deciding to terminate his parental rights to KP. In making this argument, respondent-father is necessarily attacking the trial court's October 17, 2013 order terminating his parental rights to EP pursuant to the release that he executed. See MCL 710.29(7). Respondent-father could have directly appealed that order, MCR 3.993(A)(2), but he failed to do so. Because a direct appeal was available to respondent-father, he cannot now collaterally challenge the trial court's order terminating his parental rights to EP in an appeal from the order terminating his parental rights to KP. See, e.g., *In re Hatcher*, 443 Mich 426, 436, 444; 505 NW2d 834 (1993). Outside of a direct appeal, respondent-father also chose not to file a delayed application for leave to appeal within 63 days after the trial court's entry of the termination order. MCR 3.993(C)(2); MCR 7.205(G)(6). Accordingly, we conclude that the argument related to the alleged due process violation at the release hearing of EP is not properly before this Court.

In docket no. 321017, respondent-mother argues that the trial court improperly found statutory grounds to terminate her parental rights. We disagree. In order to terminate parental rights, the "trial court must find by clear and convincing evidence that one or more grounds for

termination exist. . . ." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). We review "the trial court's determination for clear error." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459.

We find that termination of respondent-mother's parental rights was proper pursuant to MCL 712A.19b(3)(j), which provides for termination when "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if . . . she is returned to the home of the parent." The harm to the child contemplated under MCL 712A.19b(3)(j) includes emotional harm as well as physical harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Respondents were married both during the proceeding relevant to this appeal and at the time of termination. Respondent-father was mentally ill and did not consistently comply with his medication regimen. The record supported that in the weeks leading up to termination, there were concerns that respondent-father was not taking his medication properly, which caused him to have erratic mood swings, behave impulsively, have a low frustration tolerance, and demonstrate poor judgment. Further, respondent-father had cognitive processing issues, which also made him likely to behave impulsively during times of stress. KP was only five months old at the time of termination, and there were concerns that respondent-father's behavior would impact KP emotionally, psychologically, and physically. A short time before termination, respondent-mother expressed that she was afraid of respondent-father at times, and testimony supports that she obeyed respondent-father's "directives" and was unable to protect herself or KP from him. Even if respondent-mother ended the relationship with respondent-father, she was unable to parent independently and safely given her poor judgment, inability to anticipate KP's needs, and lack of insight into how her cognitive limitations impacted her parenting abilities. The trial court's finding that there was a reasonable likelihood of harm if the minor child was returned to respondent-mother's care does not leave us with "a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459. Because we have concluded that at least one ground for termination existed, we need not consider the additional ground upon which the trial court based its decision. *Id.* at 461.

In reaching this conclusion, we note respondent-mother's argument in docket no. 321017, that petitioner violated the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, by failing to tailor the service plan to her cognitive limitations. This issue is waived. *In re Terry*, 240 Mich App 14, 26 n 5; 610 NW2d 563 (2000). Because waiver extinguishes any error and precludes appellate review of that issue, *Landin v HealthSource Saginaw, Inc*, __ Mich App __, __; __ NW2d __ (2014); slip op at 13, respondent's "sole remedy is to commence a separate action for discrimination under the ADA." *In re Terry*, 240 Mich App at 26.

Next, in docket no. 321017, respondent-mother contends that the trial court clearly erred in its best-interest determination because it failed to weigh the child's placement with relatives *against* termination of her parental rights when deciding best interests. "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823

NW2d 144 (2012). We review that best interests finding for clear error. *In re HRC*, 286 Mich App at 459.

"[T]he fact that a child is living with relatives when the case proceeds to termination is a[n] [explicit] factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts*, 297 Mich App at 43 (quotation and citation omitted). A trial court's failure to consider the fact that a child is living with relatives at the time of termination "renders the factual record inadequate to make a best-interest determination . . . ." *Id.* Here, the trial court expressly considered KP's placement with her paternal grandparents at the time of termination and made detailed factual findings regarding best interests. Although respondent-mother is correct that "[t]he fact that a child is placed with a relative weighs against termination," *In re Brown/Kindle/Muhammad*, __ Mich App __, __; __ NW2d __ (2014); slip op at 9, published authority does not support that a trial court's failure to expressly weigh relative placement against termination when explicitly making findings regarding relative placement supports vacating the trial court's best-interests determination and remanding to the trial court so that further findings can be made. Because the trial court herein properly considered KP's placement with relatives at the time of termination, we decline to find that the factual record is inadequate to make a best interests determination. See *In re Olive/Metts*, 297 Mich App at 43.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Cynthia Diane Stephens